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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 624

CAPE ANN GRANITE COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

HORACE M. GRAY,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Cape Ann Granite Company, Inc., prays that a writ of *certiorari* issue to review the proceedings and judgment of the Court of Claims of the United States, entered on October 4, 1943, which dismissed the complaint herein. The Court of Claims entertained a motion by the petitioner for a new trial and filed its order overruling the motion for a new trial on November 1, 1943.

This is an action to recover on *quantum meruit* for materials supplied and services rendered by the petitioner to the U. S. Army Engineer Corps in repairing two jetties

composing the breakwater at the mouth of the Merrimack River at Newburyport, Massachusetts. The petitioner asks for the difference between the value received by the Government from it and the smaller amount paid to the petitioner by the Government.

The Government accepted the finished work. The petitioner completed the job within a reasonable time after the Government changed certain plans and specifications (R. 102, 103, 108, 109),* but several months after the original contract completion date, during which extended period the petitioner maintained an expensive marine plant on the job.

The Court of Claims held that the Government breached the contract (R. 37), but deprived the petitioner of the remedy it elected—recovery on *quantum meruit*. It further erroneously held that the Government properly withheld $25 per day penalty for 227 days—$5,675 (R. 36).

The Facts.

The facts material for the consideration of the questions of law raised herein are as follows:

Prior to the 11th day of October, 1935, the petitioner filed with the U. S. Army Engineer Corps at Boston, Massachusetts, a formal bid to repair the north and south jetties of the breakwater at the mouth of the Merrimack River, Newburyport, Massachusetts, by supplying and placing heavy granite blocks in position on the jetties.

A standard Form of Government Construction Contract was entered into on October 11, 1935 (R. 5, 110), and was approved by the Chief of Engineers on November 4, 1935 (R. 115). The work was to be completed within 365 days after receipt of notice to proceed (R. 110), excluding the

* Record references higher than (R. 40) refer to paging of unprinted record.

months of January and February in each year and such extensions as the contracting officer might permit (R. 117, 111, 113, 119).

Notice to proceed was given to the petitioner on November 7, 1935 (R. 120). This fixed the completion date as March 5, 1937 (R. 148). The petitioner commenced operations under the contract on November 8, 1935 (R. 82, 121). The contract granted the petitioner a period of 20 calendar days from the receipt of notice to proceed within which to commence operations (R. 110); but such 20 days were included in the 365 performance days.

On November 15th, 1935, the contracting officer duly granted the petitioner permission to suspend operations until April 1, 1936, because of "unsuitable weather conditions" (R. 121), pursuant to a contract provision that extensions of performance time might be granted by the contracting officer because of unusually severe weather (R. 119). In March, 1936, a disastrous flood occurred in the Merrimack River which, according to Government reports, caused changes in subsurface conditions affecting operations (R. 65, 83, 84, 159).

During the progress of the work, the petitioner's operations at the site were also greatly impeded because of unusually severe weather, combined with sea and unforeseeable current conditions (R. 117, 60, 61, 66, 76, 78, 89, 90, 102) and it made a number of applications to the contracting officer for extensions of time for performance. The contracting officer promised repeatedly to ascertain the facts and act on the applications (R. 107, 122, 131), as the contract required (R. 111), but failed to do so before all the work under the contract had been finished and the job had been accepted by the Government (R. 36).

In the early spring of 1937, the Government inspector assigned to the job (R. 101) informed the petitioner's superintendent on the job that the contracting officer intended,

and was preparing, to amend the plans and specifications for the size and shape of the mounds at the seaward ends of the jetties (R. 71, 104, 105). The mounds were large masses of heavy granite blocks intended to protect the ends of the jetties from the action of the sea (R. 64).

On September 22, 1937, the contracting officer issued Change Order No. 1, modifying the size and shape of the mounds, which the petitioner accepted and proceeded to put into execution (R. 72, 74, 108, 109). The change was an advantage to the Government (R. 108) and a detriment to the petitioner (R. 74, 75) which received no consideration therefor and was put to added expense and trouble (R. 75). The job was completed and accepted by the Government on December 22, 1937 (R. 148). The last work performed was done on the mounds (R. 74).

Although the Change Order was not issued until September 22, 1937, the contracting officer made deductions for delay (R. 113, 117) at the rate of $25 per day from March 5, 1937, to December 22, 1937, amounting to $7300 (R. 148). A payment which the Government styled "final" payment under the contract was made to the petitioner in January, 1938, and accepted by it under protest (R. 148).

Thereafter the petitioner made demand upon the contracting officer (a) for performance of his promises to investigate and adjust for unavoidable delays; (b) for additional compensation because (1) of changed conditions at the site and (2) of material misrepresentations of fact in the specifications; and (c) for the return of the $7300 withheld (R. 132-143).

The specifications represented (1) that the average current at the site was 2.1 miles per hour and (2) that there were no obstructions between the site of the work and the sea (R. 117).

The petitioner claimed (1) that the average current at the site ran between 3½ and 4 miles per hour (R. 139), and

prevented it from mooring at the site or moving its floating equipment from the site except during the slack water between tides, with consequent great delay in operations; (2) that the entrance to the river was obstructed by a shifting sandbar (R. 139) which could not be crossed except during the last three hours of the flood tide and then only with a calm sea, and (3) that a serious flood in the Merrimack River during March, 1936, had changed conditions—according to official Government notices—and caused a shoaling of the bar to about 4 feet at mean low water (R. 136-138).

On December 29, 1938, the contracting officer notified the petitioner (R. 144-147) that pursuant to his findings dated December 9, 1938, (a copy of which was later on furnished the petitioner) its claim was denied, with the exception that $1625—representing 65 days' deductions—should be refunded because of the extension of November 15, 1935 (R. 121, 148-159).

These findings of fact by the contracting officer, who was in default under the contract, were wholly *ex parte*, whereby the petitioner was deprived of a fair hearing and was denied its day in court. Within 30 days thereafter, the petitioner duly appealed to the Secretary of War (R. 31, 36) from the decision and findings of the contracting officer, pursuant to Article 15 of the contract (R. 114). Under the contract the decision of the Secretary of War only was to be final and conclusive upon the parties in the event of appeal.

The Secretary of War refused to act upon the petitioner's appeal (R. 36) on the ground that "final" payment had been made; and referred the matter to the General Accounting Office. The latter, in August, 1939, made the allowance of $1625 above mentioned which was thereupon paid the petitioner and received under protest. This action was commenced in the Court of Claims on September 29, 1939 (R. 1).

The Court of Claims based its findings (1) that conditions at the site had not been changed by the flood of March, 1936, and (2) that the weather was not unusually severe, upon these findings of the contracting officer (R. 32, 33, 37), unsupported by any evidence and contrary to the uncontradicted evidence in the record (R. 72, 73, 159).

This action of the Court of Claims was particularly arbitrary and capricious because the contracting officer was an interested party to the dispute in that he was in default in failing to make the prompt investigations and decisions required by the contract (R. 36) and was interested in establishing that his defaults under Articles 4 and 9 of the contract did not in fact affect the petitioner. His finding of no change in conditions was in direct conflict with contemporaneous reports of changed conditions made by his own office (R. 93) and appearing in official notices to mariners introduced in the Record (R. 84, 159).

The Court of Claims also arbitrarily and capriciously found, without any evidence in support thereof, that the average current at the site was but 2.08 miles per hour throughout the tidal cycle (R. 22, 35, 47); and notwithstanding the unanimous, uncontradicted evidence that the average current substantially exceeded 3 miles per hour (R. 60, 61, 66, 76, 78, 89, 90, 102) in full support of the petitioner's claim of material misrepresentation of fact by the Government in the specifications.

The Court of Claims also declined to make any finding that Change Order No. 1 had been issued nor of its contents although there was no dispute as to its issuance and its terms and the petitioner specifically requested such a finding in its motion for a new trial (R. 16).

The Court of Claims held that the United States had breached the contract by failing to perform its duty of making decisions and that the petitioner had the right to

sue on the contract (R. 37), but denied the petitioner its right of recovery under *quantum meruit*.

The petitioner was thus arbitrarily deprived of its right of election of remedies.

Questions Presented.

1. Is not one who contracts with the Government entitled to his "day in court" and a fair hearing before a departmental officer, including a fair opportunity to offer evidence, cross-examine and oppose proffers of evidence, when the contract merely provides that the contracting officer shall, in case of dispute, decide questions of fact, subject to conclusive determination by the head of the department upon appeal?

2. As due process under the contract, does not its provision for an appeal to the head of the department require a record of a hearing before the contracting officer with which to test his findings?

3. Has not the petitioner been deprived of its property without due process of law in violation of the Fifth Amendment of the Constitution by the denial of recovery in *quantum meruit* after the Court held the Government had breached the contract?

4. Was not the petitioner denied due process of law when the Court of Claims based its adverse judgment upon *ex parte* findings of fact made without any hearing by the contracting officer, an interested party to the dispute involved, from which findings the petitioner had duly appealed and which were not affirmed by the appellate authority?

5. Was not the petitioner denied due process of law when the Court of Claims based its adverse judgment upon findings of facts (as to current velocity) made without any evidentiary support in the record?

6. Has not the petitioner been denied due process of law in that the Court of Claims refused to give any effect to Change Order No. 1 with respect to deduction of penalty for alleged delay in performance; and refused to make a finding of the undisputed facts concerning its issuance and terms?

Proceedings in the Lower Court.

The petitioner filed its petition in the Court of Claims on September 29, 1939. The Government filed its general traverse on October 13, 1939. The evidence was introduced before Commissioners Church and Gordon and was concluded on November 28, 1941. The Report of Commissioner was made by Commissioner Evans and was filed October 19, 1942. The petitioner filed Exceptions to the Commissioner's Report on November 17, 1942. The Government filed Exceptions to the Commissioner's Report and Request for Special Findings on November 27, 1942. The petitioner filed its Request for Special Findings and Brief on December 7, 1942. The Government filed its Request for Special Findings of Facts and Brief on February 15, 1943. The case was tried to the Court on April 7, 1943. On June 7, 1943, the Court filed its Special Finding of Facts and Opinion granting judgment to the petitioner in the sum of $250. The petitioner filed its motion for a new trial on July 31, 1943. The Court, on October 4, 1943, overruled the petitioner's motion for a new trial and, on its own motion, vacated and withdrew the Special Findings of Fact, Conclusion of law and opinion filed June 7, 1943, and filed new Special Findings of Fact and conclusion of law dismissing the petition and entering judgment in favor of the United States with opinion by Judge Whitaker. The petitioner moved on October 20, 1943, for leave to file a second motion for a new trial. The motion was allowed on October 27, 1943, and petitioner's second motion for new

trial was filed the same day. The Court overruled the motion on November 1, 1943.

Assignments of Error.

The errors which the petitioner urges as grounds for granting a writ of certiorari and for reversing the judgment of the Court of Claims are:

1. The Court denied the petitioner due process of law.

2. The Court failed to grant recovery to the petitioner in *quantum meruit* upon the Government's established breach of the contract.

3. The Court's findings as to whether conditions and changed subsurface and latent conditions were made without substantial evidence to sustain them but solely upon *ex parte* findings by the contracting officer, an interested party, from which the petitioner had appealed as provided by the contract, and which were not affirmed by the appellate authority.

4. The Court based its judgment in material respects upon findings of fact as to current velocities, which it made without any substantial supporting evidence, but contrary to the evidence.

5. The Court failed to give effect to Change Order No. 1, issued more than six months after the completion date fixed by the contract or to find the undisputed facts as to its issuance and terms although expressly requested by the petitioner to do so.

6. The Court held that deduction of penalty for 227 days' alleged delay was properly withheld from the petitioner.

Reasons for Granting the Writ.

1. This case presents important questions in the interpretation of the Standard Form of Government Construc-

tion Contract. (*United States* v. *Brooks Callaway Co.*, 318 U. S. 120, 122.)

2. In view of the prevalent general practice to include in government contracts provisions for the determination of facts in dispute by an administrative officer, it is of general public importance that this Court settle whether the federal law requiring a fair hearing before administrative boards as defined in the case of *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91, shall apply to Government officials empowered by such contracts to determine the facts involved in disputes arising under them, and thus provide due process of law.

3. The Court of Claims has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of its power of supervision by this Court with respect to the following:

A. Its adoption of the contracting officer's findings of fact which were not binding upon the petitioner—even if the contract were not rescinded for breach by the Government—sets a wrong precedent and invades the petitioner's right to due process.

B. Its refusal to grant recovery in *quantum meruit* after holding that the Government breached the contract is in conflict with the decisions of this Court in the cases of *Clark* v. *U. S.*, 95 U. S. 539, 542, 543; *U. S.* v. *Behan*, 110 U. S. 338, 345, 347; and *Ankeny* v. *Clark*, 148 U. S. 345, 353; and with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Kneberg* v. *Green Co.*, 89 F. (2d) 100, 104, and deprives the petitioner of the benefit of its elected remedy.

C. Its refusal to give any effect to Change Order No. 1 whereby the Government was partly, if not wholly, responsible for the delay in completion of the work, conflicts with

the ruling of this Court in the case of *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236, 243; and with a long line of prior decisions in the Court of Claims from *Ittner* v. *U. S.*, 43 C. Cls. 336, 351; to *Camp Sales Corp.* v. *U. S.*, 77 C. Cls. 659, 664.

D. Its finding as to average current velocity, upon the issue of misrepresentation of facts, was contrary to the indisputable character of the evidence (*Int. Com. Comm.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91).

WHEREFORE, it is respectfully submitted that this petition should be granted.

CAPE ANN GRANITE CO., INC.

HORACE M. GRAY,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

HORACE M. GRAY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion Below.

The Opinion filed by the Court of Claims appears at page 33 of the Record. It has not yet been reported.

II.

Jurisdiction.

Substitute Special Findings of Fact, Conclusion of Law and Opinion were filed on October 4, 1943 (R. 18). Thereafter, the Court of Claims entertained a motion by the petitioner for a new trial and filed its order overruling the Motion for a New Trial on November 1, 1943 (R. 38). Jurisdiction of this Court is invoked under the Act of February 13, 1925, Chap. 229, § 3, 43 Stat. 939, as amended by the Act of May 22, 1939, Chap. 140, 53 Stat. 752; Title 28 U. S. Code, § 288(b).

III.

Specification of Errors to Be Urged.

All of the errors set forth in the Assignments of Error (Petition, p. 9 *ante*) will be urged.

IV.

Facts.

The facts are stated in the Petition (*ante*, pp. 2-7) to which reference is made.

V.

ARGUMENT.

Point 1.

The Petitioner Has Been Deprived of Its Election to Recover Upon Quantum Meruit.

The Court of Claims stated in its opinion that the Government breached the contract by reason of the failure of the Contracting Officer and the Secretary of War to perform their duty of making decisions (R. 37).

This conclusion was based upon undisputed facts and, therefore, became a conclusion of law. *Brown-Crummer Inv. Co.* v. *Koss Const. Co.* (CCA8), 4 F. (2d) 682, 685; 13 *Corpus Juris*, p. 790, § 1011. Its place is among the Conclusions of Law rather than in the opinion alone.

The breach by the Contracting Officer was serious because under Articles 4 and 9 *immediate* investigation was essential while the facts were fresh and witnesses were available. The refusal of the Secretary of War to perform was serious because he denied the contractor such "due process" as the contract itself provided in terms.

The exact damage suffered by the petitioner is impossible of ascertainment so the petitioner elected fo recover upon *quantum meruit*.

The Court of Claims was wrong when it sought to limit the petitioner "to bring suit * * * under the contract" (*Feick* v. *Stephens et al.* (CCA6), 250 Fed. 185, 187-8) and thereby deprived the petitioner of a substantial property right in violation of the Fifth Amendment.

Congress may abolish or modify a remedy (*Tennessee* v. *Sneed*, 96 U. S. 69, 73) but until Congress acts, the aggrieved party is entitled to the recognition and enforcement of his existing rights by the Courts.

The law as to election of remedies upon breach of contract is stated in *Blair Engineering Co.* v. *Page Steel & Wire Co.* (C. C. A. 3), 288 Fed. 662 at pp. 664-5:

> "On a breach of a valid contract, the injured party has one of two legal remedies: He may sue on the contract for damages he has sustained by reason of the breach, *or he may consider the contract terminated by the breach and sue on the quantum meruit* under an implied contract and recover for his services and the amount expended by him on the contract." (Italics supplied.)

See also, to the same effect:

Ankeny v. *Clark*, 148 U. S. 345, 353;
Kneberg v. *Green Co.*, (C. C. A. 7) 89 F. (2d) 100, 104.

This Court has sustained recoveries upon such basis.

U. S. v. *Behan*, 110 U. S. 338, 345, 347;
Clark v. *U. S.*, 95 U. S. 539, 543;
Salomon v. *U. S.*, 86 U. S. (19 Wall.) 17, 19.

In this case the petitioner has computed its claim by adding 15% for overhead expense and services to its cost of performance $167,286.40 (R. 142) making the total of $192,379.36, and by deducting therefrom the total amounts paid by the Government, $127,689.33 (R. 143, 148, 158) leaving a balance of $64,690.03 which is claimed in the petition (R. 4).

The Court of Claims approved an allowance of 20% in *Sheridan-Kirk Contract Co.* v. *U. S.*, 53 C. Cls. 82, 86; and the contract itself provides for a 15% allowance above cost on extra work (R. 112). Payment as claimed is at the rate of $4.154 per ton. The Government estimated the cost at $4.279 per ton with Army plant and equipment (R. 93).

Prayer for relief "either in a general manner, or in an

alternative or cumulative form'' when supported by the facts set forth in the petition is sufficient.

U. S. v. *Behan, supra,* at page 347;
Clark v. *U. S., supra,* at page 543.

POINT 2.

The Adoption by the Court of Claims of Certain Findings of the Contracting Officer Violates Due Process.

The petitioner claims that its rights have been violated through the denial by the Court of Claims:

1. Of due process of law as guaranteed by the Fifth Amendment; and

2. Of due process as established by the parties in their contract.

The petitioner complains that the Court of Claims adopted *ex parte* findings of the Contracting Officer (R. 32, 33, 37) made December 9, 1938, nearly a year after the petitioner had completed the job to the satisfaction of the Government (R. 148). These findings affected substantial rights of the petitioner.

The Contracting Officer who made the findings was Col. A. K. B. Lyman (R. 159). He is the same Col. Lyman whose unfulfilled promises to investigate and determine the facts commenced at least as early as December 10, 1936 (R. 122, *cf.* R. 107, 131).

Articles 4 and 9 of the Contract (R. 111, 113) required prompt investigation by the Contracting Officer. In none of his letters does Col. Lyman assert that the notifications by the Contractor came too late. The Government first discovered the changed conditions as shown by its official notices. The contract required no further notice by the Contractor.

Col. Lyman was, therefore, interested in clearing his own skirts from his defaults under the contract; and proceeded to do so in his *ex parte* findings. He found no conditions to exist that would have required him to adjust the contract.

He gave the Contractor no opportunity to submit proofs or to attack the "proof" he considered *nor does he specify all proofs he considered.* Nevertheless, he comments in Finding 31 (R. 157): "No proof is offered in support of his (the Contractor's) statement that &c."

Due process of law requires a hearing before judgment. Hence, Col. Lyman's arbitrary exercise of power, which had not been granted him by the terms of the contract, violated the due process clause of the Constitution and the adoption of his findings by the lower court repeated the violation.

As this Court said in *Garfield* v. *Goldsby*, 211 U. S. 249, at page 262:

> "* * * there is no place in our constitutional system for the exercise of arbitrary power, * * *"

The terms of the contract gave Col. Lyman no authority to exercise over the Contractor the power described by this Court in *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 227 U. S. 88, 91, where it is said:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by *no other officer,* administrative body or tribunal under our Government." (Italics supplied.)

The agreement providing for the determination by the Contracting Officer of facts in dispute cannot logically be extended to include a waiver of a fair hearing.

The doctrine strongly applies where the trier has a personal interest to protect.

Such a situation was apparently contemplated in the contract because, under Article 15, the Contractor had the right to appeal to the head of the department (in this case, the Secretary of War) from the findings of the Contracting Officer (R. 114).

After an appeal, the decision of the head of the department *alone* was binding on the Contractor. This petitioner appealed (R. 31, 36). The Secretary of War refused to perform (R. 31, 36). Hence, Col. Lyman's findings have no evidentiary force except as admissions against interest.

But the provision for appeal clearly implied a record of a hearing had before the Contracting Officer to be submitted on appeal so that the appellate authority could test the soundness of the findings from which the appeal was taken. The omission would have been cured if the Secretary of War had accorded the Contractor a hearing in the nature of a trial *de novo*.

Lloyd Sabaudo Societa v. *Elting*, 287 U. S. 329, 335-6.

Here there was no opportunity given the Contractor for any hearing and no record was made. The maps referred to in Par. 31 of Col. Lyman's findings (R. 157) were not supplied the Contractor and are not in evidence in this action.

In the case at bar, the findings of the Contracting Officer adopted by the lower court related to the existence of changed conditions at the bar (Finding 7, R. 22-23; *cf.* Par. 31, R. 157) and to unsuitable weather conditions (Sp. Finding 8(o) (t), R. 30-33; *cf.* Pars. 25-28; R. 154-156). The court's adverse findings on these subjects had no other support in the record. They were contrary to the otherwise uncontradicted evidence (R. 69, 72, 73).

Official Government publications, compiled from data supplied by the Contracting Officer's own office (R. 93), detailed "changed" conditions, *e. g.:*

The Department of Commerce issued a bulletin on July 1, 1936, stating in part:

> "From the bar at the mouth of the river to Haverhill numerous shoals exist and *changes have taken place* due to floods which occurred last spring. * * * There is a depth of about 4 feet over the bar at low water and the charts cannot be relied upon. Pending a resurvey of the river, Chart 331 will be cancelled." (Italics supplied.) (See R. 22.)

As to C. & G. S. Chart No. 1206 (R. 21) depths at the Merrimack River were expunged (R. 159).

This bar, concededly an obstruction (R. 60, 67, 69, 77) was warranted no obstruction in Par. 7 of the Specifications (R. 117) which stated:

> "There are no bridges or other obstructions between the proposed work and the sea."

The president of the contractor who prepared the bid was not a seaman (R. 81) and relied upon the representations of the Government (R. 84-6).

This bar was such an obstruction that it could be crossed *only* during the last three hours of the flood tide and then only with a calm sea (R. 67, 89). Granite was trucked overland at extra expense so the Contractor could work when the bar could not be crossed (R. 68, 84).

Weather conditions alone were not indicative of working conditions at the site (R. 60-1, 78, 80). It was necessary to make visits to the site in a boat (R. 61-2, 67, 68, 70, 77, 78) to determine whether work could be done.

Conditions during operations in years past were *not comparable* (R. 63, 64, 65, 69, 71) and the petitioner was deprived of the right to cross-examine those whose data was used by Col. Lyman in making his *ex parte* findings (R. 154).

The right to cross-examine is a constitutional one.

Gonzales v. *Zurbrick* (CCA6), 45 F. (2d) 934, 937.

POINT 3.

The Court of Claims Erroneously Failed to Find the Facts Concerning the Undisputed Issuance of Change Order No. 1 Which, as a Matter of Law, Annulled the Penalty Provisions.

Change Order No. 1 modified the size and shape of the mounds at the exposed seaward ends of the jetties (R. 85). It was issued on September 22, 1937 (R. 85, 108). The modified completion date of the contract was May 9, 1937, as fixed by the lower court.

The Contractor's superintendent was notified by the Government Inspector on the job in March, 1937,—*before the completion date*—that the mounds were to be modified (R. 104, 105). So work on the mounds was suspended during the favorable summer months (R. 71, 85, 86). The Government Inspector controlled the placing of stone (R. 64, 119, Par. 16; R. 112, Art. 18).

The work on the mounds was completed and the job was accepted by the Contracting Officer on December 22, 1937 (R. 19). That was a reasonable time within which to perform the work (R. 86). The Inspector testified that there were only two days during that period when the Contractor could have worked but did not and on those two days the plant was under repair (R. 102, 103).

Nevertheless, the Contractor was penalized for the period between May 9, 1937, and December 22, 1937, (227 days at $25—$5,675) and the lower court approved (R. 25, 33, 36).

The Change Order annulled the obligation for liquidated damages and the Contractor became entitled to a reasonable time thereafter within which to complete performance.

The law applicable to the state of facts here existing was defined by this Court in the case of *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236, 243, where

the Court approved the ruling in *Mosler Safe Co.* v. *Maiden Lane Safe Deposit Company*, 199 N. Y. 479, at page 489. There the Court of Appeals, speaking through Gray, J., stated:

> "Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled and, in the absence of some provision under which another date can be substituted, it cannot be revived. If the respondent (contractor) failed to complete within a reasonable time after crediting the appellant's (employer) delays, then the latter had a cause of action for the former's neglect and the measure of damages would be the actual loss proved to have been sustained."

This is in accord with prior decisions of the Court of Claims in *Ittner* v. *U. S.*, 43 C. Cls. 336, 351, and *Camp Sales Corp.* v. *U. S.*, 77 C. Cls. 659, 664.

The petitioner does not concede that it was responsible for any delay (R. 65, 68, 70, 72, 73). Delay attributed to it by the Government arose from physical conditions misrepresented and warranted against by the Government. The petitioner in good faith struggled on to completion (R. 87) and complied with all instructions of the Contracting Officer, however arbitrary. (*United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, 11-12; *United States* v. *Smith*, 256 U. S. 11, 16-17.)

The Contractor was obliged to accept the change under Article 3 of the contract (R. 111). It received no consideration for being obliged to work at the most exposed portion of the site during the roughest season of the contract period—which unduly protracted the maintenance of the plant on the job (R. 105, 80)—and, hence, gave up no rights.

> "A clause in a Government contract without consideration is nonenforceable." (*Burke & James, Inc.* v. *U. S.*, 63 C. Cls. 36, 57.)

Col. Kingman, the original contracting officer, had ruled (R. 99) that weather conditions between November 15th and January 1st were "unsuitable" (R. 119, Par. 15).

In passing, we point out that Col. Kingman's suspension of operations ran 77 days from November 15, 1935, and not 65 days from November 27th (R. 19) as the lower court erroneously held (R. 36). Although the Contractor was not obliged to commence work until 20 days after Notice to Proceed (R. 117), work had been commenced on November 8, 1935 (R. 82, 120-1), and the 20 days' grace were included in the 365 day performance period (R. 117).

Even if the contract were not to be considered as rescinded for breach by the Government, the measure of recovery because of the Change Order would be the same as that demanded in the petition in view of the extension of the performance period to finish the work under the Change Order. The amount claimed covers only cost of plant maintenance during the periods of operation as required by the Contracting Officer and materials, plus reasonable overhead and services.

Therefore, the refusal of the lower court to find the undisputed fact of the issuance of the Change Order and its terms and the approval of the penalty deductions disregarded the petitioner's substantial rights.

POINT 4.

The Finding That the Average Velocity of the Current Throughout the Tidal Cycle Was 2.08 Miles Per Hour Is Wholly Without Support in the Evidence.

The determination of average current velocity was determinative of a vital issue—a material misrepresentation in the Specifications that directly and seriously hindered and delayed performance by the Contractor (R. 82, 88), and materially increased its cost through extending the time of

performance. The heavy current acting with the undertow would snap lines (R. 73) and cause violent surging that made the granite blocks swing on the derrick and endanger life and limb (R. 64, 67, 69, 78, 105).

The testimony of five experienced seamen—two of them Government witnesses—was unanimous that the average current at the site was over 3 miles per hour (four of them fixed it between 3¼ to 4 m. p. h. (R. 60, 61, 66, 76, 78, 79, 89)).

They, as practical experts (R. 66), gauged the current against the known speed of vessels stemming it (R. 61, 73, 74, 76, 89, 99-100).

The Government Inspector, Captain Head, frankly stated on direct examination that the Contractor was affected by the current because it could not moor its stone lighters at, or move them from, the site *except during slack water* between tides, when the current was less than 3 miles per hour (R. 102).

In paragraph 7 of the Specifications, the Government represented:

> "The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations."

A current of 2.1 m.p.h. would have presented no difficulty in operation (R. 67, 70, 71, 72, 74, 77, 79, 87-8). There is no evidence in the record that a current of 2.1 m.p.h. would have produced the effects actually experienced by the Contractor.

Slack water between tides existed for about an hour (R. 77, 79, 80) with the result that *every day during daylight hours* between slack before ebb and slack before flood—a period of about 7½ hours, because of the river discharge (R. 61, 66, 69, 77)—the Contractor's floating equipment could not be moved for about *six hours*.

Similarly, during the period between slack before flood and slack before ebb—about 5 hours (R. 66, 69, 77)—the Contractor's plant could not be moved for *another three hours every day.*

Then add to this the undisputed fact that, because of the swift current, no work at all could be done on the north jetty during the ebb tide (R. 69, 71) and some idea may be gained of the serious effect of this excessive current upon operations.

The lower court relied solely upon the testimony of the Government witness, Malkasian, who had made some investigation in November, 1937, to learn the *direction* of the currents at and near the breakwater on the *ebb* tide alone (R. 99). His conclusion of an average tidal current of 2.08 m.p.h. was based upon a graph (A-A) shown on Exhibit M (R. 163), which was plotted with *three* points representing the *mean* of the velocities in the three groups of his observations (indicated by the jagged lines on that Exhibit) when the tide was falling (1) to six feet above mean low water, (2) from six to three feet above mean low water and (3) from three feet down to an undefined limit. It does not take much knowledge of mathematics to appreciate the absurdity of an attempt to plot a curve beyond three given *loci*, as this witness did not obtain a foundation for his testimony.

This graph A-A shows that the "period of observation" extended for but 3 hours and 45 minutes of an assumed ebb tidal period of 6½ hours. By dividing the area within the whole curve by 6½ a result of 2.08 m.p.h. was obtained.

The catch-as-catch-can mathematics of this "expert" witness which the lower court adopted are incontestably and demonstrably wrong.

This Court said in *Baltimore & O. R. R. Co.* v. *U. S.*, 298 U. S. 349 at page 378:

> "And they rightly say that opinions of experts unsupported by adequate actual tests may not safely be substituted for concrete data."

Malkasian's data can apply only to his period of observation. Any assumption outside of that period is not evidence. In fact, the *mean* of Malkasian's observations taken while the tide was falling below the level of six feet above mean low water produces a velocity of 3.177 m.p.h. On the last day he terminated his observations immediately after he had found a velocity of 4.4 m.p.h. near the north jetty (Exhibit L).

On the basis of Malkasian's testimony, the lower court found an average of 2.08 m.p.h. during the *whole* "tidal cycle" (R. 22, 35).

But the tidal cycle is about 12½ hours and "includes the ebb and flood tides" as stated by the Government engineer, Mr. Porter (R. 92, 93). Malkasian's observations included but 3.75 hours of the 12.5 hours in the tidal cycle and his result was a *mean* of a total of but 24 individual current observations all taken at *different* points during three days (R. 94). This was not the average current at any point. "Average" used as an *adjective*—as in this contract—means "usual". (*Cf. Wickard* v. *Filburn,* 317 U. S. 111, 125). The bidders were interested in the effect of the usual current upon operations—not in some abstruse mathematical calculation nor in the quotient of a sum divided by the number of its terms.

Since the Government drew the contract, its language is to be construed strictly against the defendant. "Mean" is distinguished in the same paragraph of the Specifications (Par. 7) where the representation is made that the "mean range of the tide is 7.9 feet" (R. 117).

Hence, this essential finding by the lower court was contrary to all the evidence and was without any evidentiary support in the record.

"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The Chicago Junction Case, 264 U. S. 258, 265.

See also:

Shields et al. v. *Utah Idaho Central R. R. Co.,* 305 U. S. 177, 185;

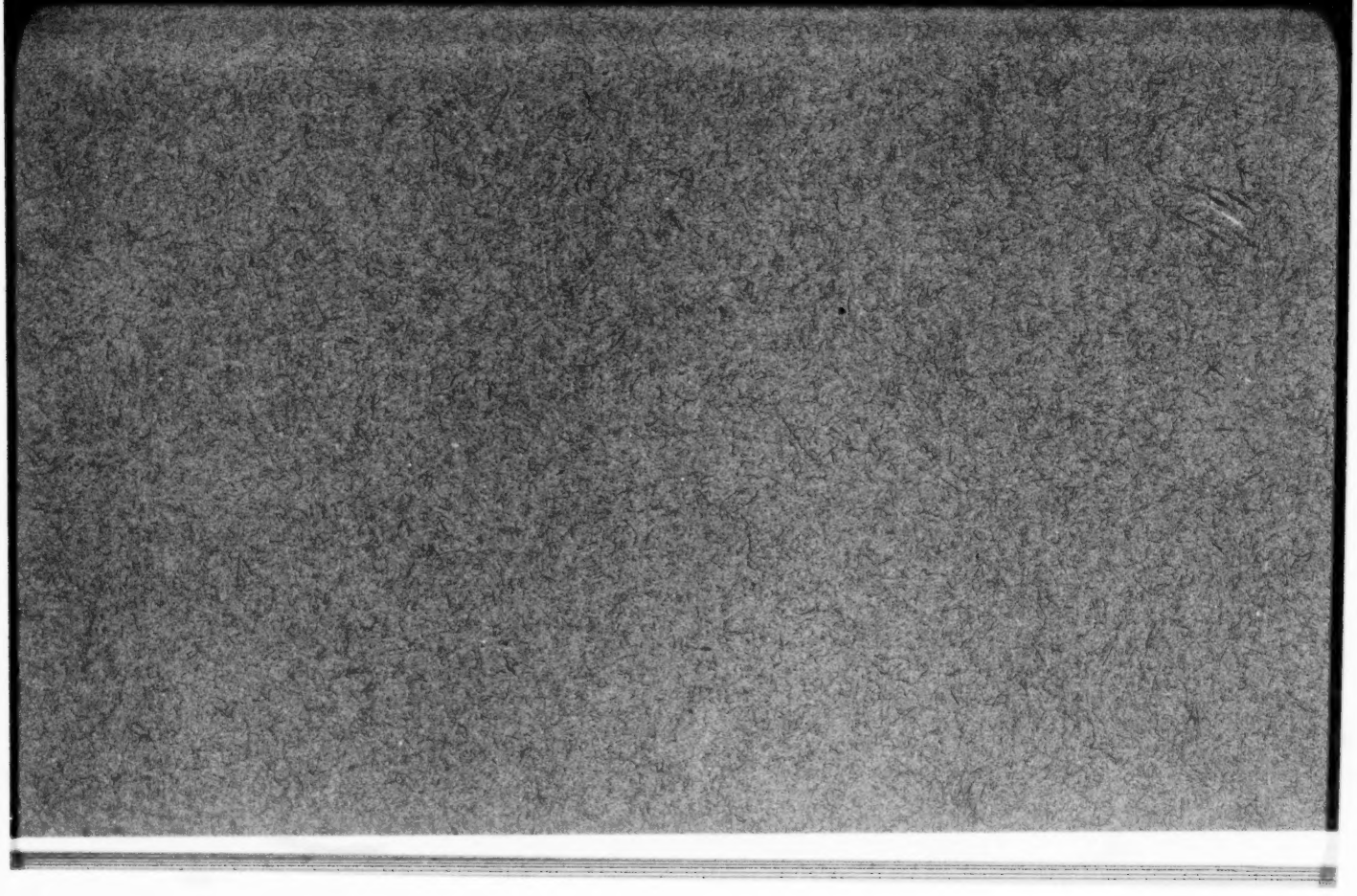
I. C. C. v. *L. & N. R. R. Co.,* 227 U. S. 88, 91.

Respectfully submitted,

HORACE M. GRAY,
Attorney for Petitioner.

January 20, 1944.

[redacted]



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 624

CAPE ANN GRANITE CO., INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 33–38) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered October 4, 1943 (R. 38).[1] Petitioner's mo-

[1] On June 7, 1943, the court below issued Special Findings of Fact together with an opinion. Petitioner then moved for a new trial. The Government opposed the motion and asked the court to correct its error in holding petitioner entitled to a remission of $250 as liquidated damages for ten days' delay in completion. The court denied petitioner's motion and, pursuant to the Government's request, corrected its findings of fact and modified its opinion accordingly on October 4, 1943. The judgment here sought to be reviewed was entered the same day.

tion for a new trial was overruled on November 1, 1943 (R. 38). The petition for a writ of certiorari was filed on January 22, 1944 (R. 40). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the findings of the court below that no material change requiring an equitable adjustment had occurred in subsurface or latent conditions subsequent to the time of the contract; that the velocity of the current, a matter affecting the difficulty of performance, was properly represented in the contract specifications; and that the weather during the period of performance had not been unusually severe, nor more severe than might have been expected.

2. Whether a change order accepted by petitioner and never protested, which stipulated that it in no way affected the completion date originally fixed, extended the time of performance under the contract.

3. Whether, after completion of the contract by petitioner and final payment thereunder by the Government, the refusal of the Secretary of War to review certain findings of fact made by the contracting officer under the contract, which if reversed would have merely entitled petitioner to additional payments, justified "rescission" of

the contract by petitioner and recovery in *quantum meruit*.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, pp. 24-25, *infra*.

STATEMENT

Petitioner entered into a contract with the United States on October 11, 1935, to repair the jetties at the entrance to Newburyport Harbor, Mass., at a unit price of $2.88 per ton of rubblestone furnished and placed in the jetties (R. 5–6, 19).[2] Petitioner was given notice to proceed on November 7, 1935 (R. 25), fixing March 5, 1937, as the completion date. However, on November 15, 1935, the Government at petitioner's request suspended all work until April 1, 1936 "on account of unsuitable weather conditions," and extended the completion date accordingly to May 9, 1937 (R. 25; PR. 121).

Petitioner resumed work on April 18, 1936 (RR. 58), but after working for four days, ceased operations until June 1, 1936, in order to obtain a suitable tow-boat (PR. 70; RR. 59, 93, 133–137). After working until September 30, 1936, petitioner's equipment was withdrawn for repairs and work was not again resumed until late in March

[2] The unprinted record designated by petitioner is referred to as "PR"; the unprinted record designated by respondent, as "RR"; and the printed record, as "R."

1937 (RR. 152). During this period and subsequent thereto, petitioner requested several extensions of time and authority temporarily to suspend work on account of repairs to equipment, need to obtain additional equipment, "unseasonable weather" and "unusually rough seas" (R. 25–28; RR. 171 (Ex. 47); PR. 161 (Ex. F)).[3] The Government consented to temporary suspension until March 1, 1937, on the understanding that no extension of time on this account would be granted unless weather or natural conditions were found, upon "investigation," to have been abnormal and unusual (R. 25–27).

On August 13, 1937, in response to the petitioner's requests for extensions of time, the contracting officer wrote petitioner complaining of the lack of progress and pointing out that in 1937 only 2,000 tons per month were being laid, compared with an average of 5,000 tons per month in 1936 (R. 28; PR. 106 (Ex. 3)). Petitioner replied on September 14, 1937, blaming the lack of progress on "subsurface and latent conditions * * * materially differing from those shown on the drawings or * * * specifications; * * * unusually severe weather and sea conditions" and "inability to procure additional and suitable plant because of the reluctance of owners to expose their equipment to the hazardous conditions" due to changes caused by the flood of 1936 (R. 28; PR. 123 (Ex. 64)).

[3] Exhibits introduced by petitioner in the court below are identified by numbers; those by respondent, by letters.

On September 22, 1937, when 90% of the stone had been laid, the Government issued, and petitioner accepted, a change order modifying the shape of the mounds at the end of the jetties, with no extension of time or change in unit price because the change "will not increase the difficulty of placing the stone" (R. 16–18). Work was finally completed on December 22, 1937, or 227 days after the amended completion date (R. 25). The last payment at the unit price, minus liquidated damages for the delay was made January 6, 1938, and was received under protest by petitioner.

On August 22, 1938, petitioner wrote the contracting officer to request remission of the amounts withheld as liquidated damages, and additional compensation on account of changed subsurface conditions and of the change in the contract (R. 29, 30; PR. 132 (Ex. 73), 135 (Ex. 75)). On December 29, 1938, the contracting officer made findings of fact and denied both requests (R. 30; PR. 144–159 (Ex. 76, 85)). Petitioner sought to appeal his findings to the Secretary of War (R. 31; RR. 184 (Ex. 77)) who refused to consider the appeal, advising petitioner that the matter "must be referred to the General Accounting Office for direct settlement" because it was "filed subsequent to completion of the contract" (R. 31; RR. 186 (Ex. 78)). The General Accounting Office remitted $1,685 of the amount deducted for liquidated damages, because of the change

made in the original completion date by the first suspension order of November 15, 1936.

Petitioner thereupon brought suit in the court below to recover $5,675, the balance of the liquidated damages withheld, and $59,005 as additional compensation (R. 1–5). The alleged grounds for recovery were that the Government had misrepresented a sandbar and the average velocity of the current; that changed subsurface and latent conditions at the site of the work, unusually severe weather, and the delay in supplying the final specifications for the mounds, had delayed petitioner's performance without its fault, entitling it to the additional cost thereby incurred, a reasonable profit thereon, and remission of the amount deducted as liquidated damages. The court below found against petitioner on each item. It found that there had been no misrepresentation as to the sandbar (R. 19, 20, 34) nor as to the velocity of the current (R. 21, 22, 35); that there had been no change in subsurface conditions by reason of flood (R. 22, 23, 35); and that the claim last mentioned was an afterthought designed as an excuse for tardiness (R. 35). The court further found that the weather prevailing during the course of the work was not unusually severe or of an unexpected kind (R. 31–33, 37). While the refusal of the Secretary of War to review the findings of the contracting officer was denominated a breach of contract, the court held that a review of such findings showed that the

contracting officer had acted correctly in denying the various requests for extension of time (R. 37).

ARGUMENT

Petitioner contends that the findings of the court below in respect of current velocity, weather conditions and latent subsurface conditions are not supported by substantial evidence; that it has been denied due process because the court's findings are rested upon improper findings of the contracting officer; that the Change Order of September 22, 1937, annulled the liquidated damage provision of the contract; and that it is entitled to rescind the contract and recover upon a *quantum meruit*. We submit that these contentions are without merit and that the case was correctly decided below.

1. THE FINDINGS BELOW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

(a) *Current Velocity.* The specifications provided that "the work is exposed to severe easterly storms. * * * The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations" (Appendix, p. 24 *infra*). Petitioner contends that the current velocity was understated (Pet. 21–22). There is, however, ample evidence to support the court's finding (R. 35) that the actual velocity was 2.08 miles per hour. The Government had made a scientific study of current velocity under various tidal conditions and over the full tidal

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cycle and the average stated in the specifications was the result of that study (R. 35; PR. 94–99, 163 (Ex. M); RR. 114–124, 191 (Ex. L)). The only opposing testimony consisted of statements by various mariners based upon observation and surmise (PR. 73; RR. 67, 121, 122). Error cannot be predicated upon resolution of conflicting testimony in favor of the Government. *Lytle* v. *State of Arkansas,* 22 How. 193, 207; *Adamson* v. *Gilliland,* 242 U. S. 350.

Moreover, petitioner became aware of the effect of the current on working conditions as soon as it commenced work; yet in all the extensions of time requested prior to September 1937—almost two years after the contract was signed—no allusion was made thereto as the cause for the delay. If there had been any misrepresentation, it had long since been waived by petitioner (*Upton* v. *Tribilcock,* 91 U. S. 45, 54; *Church* v. *Swetland,* 243 Fed. 289 (C. C. A. 2), appeal dismissed, 249 U. S. 579).

(b) *Representation as to Sandbar.* Petitioner cites the provision in the specifications that "There are no bridges or other obstructions between the proposed work and the sea" and claims that this was a misrepresentation because a sandbar existed in front of the harbor, impeding the work (Pet. 4). This claim was rightly rejected below. The map accompanying the invitation to bid showed a channel in the harbor and contained the word "Bar" (RR. 51, 52, 107, 108); para-

graph 1 of the specifications stated that the location of the work "is shown on United States Coast & Geodetic Survey charts Nos. 331 and 1206", which depicted the sandbar in front of the harbor and the same channel through the bar as was indicated upon the map accompanying the bid (R. 20). The bar was well known among mariners;[4] it could have been discovered by the most cursory examination (PR. 61); and the president of petitioner, a civil engineer with prior experience in building breakwaters, visited the site of the work for some four hours prior to submitting his bid (PR. 81) and took the bar into consideration in making his bid (PR. 85). Clearly, there was no misrepresentation.[5]

(c) *Changed Subsurface Conditions.* Article 4 of the contract (Appendix, p. 22 *infra*) provides that "Should the contractor encounter * * * during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the

[4] R. 20; RR. 28, 35, 50, 51, 71, 74, 78, 95, 128, 166.

[5] The standard government instructions admonished bidders that "Special care should be exercised in the preparation of bids. Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies" (R. 20; RR. 112, 189 (Ex. C)). The specifications stated that "No allowance will be made for failure of a bidder correctly to estimate the difficulties attending the execution of the work" (PR. 117 (Ex. 38)).

contracting officer shall be called immediately to such conditions", and if the latter finds that they differ materially from those indicated in the specifications, he shall, subject to the approval of the head of the department, adjust the cost and time under the contract.

Petitioner contends (Pet. 17–18) that a change occurred in the sandbar as a result of the 1936 flood in the Merrimac River, changing the conditions at the site and requiring an adjustment under Article 4. But the changed conditions which resulted from the March 1936 flood occurred before any work had been done on the jetties, and not until a year and a half later were such changes cited by petitioner as justifying the delays in the completion of the contract (R. 34). This is scarcely the immediate action called for by Article 4. *Sanford & Brooks Co.* v. *United States,* 267 U. S. 455. Moreover, the court below properly found that there had been no material changes in the subsurface or latent conditions as a result of the flood (R. 20–22), for while the minimum depth of water over the bar had decreased, the minimum depth of the channel through the bar—the only factor having any effect on operations—had remained substantially unchanged.[6] In any event, the court

[6] A survey made in July 1936 by the Department of Commerce showed the minimum depth of water over the bar to have decreased from seven to four feet, but the shallowest depth of the channel through the bar had merely changed from ten feet prior to the flood to 9.5 feet (R. 22; PR. 157 (Ex. 85)).

found and the evidence shows that the sandbar was constantly shifting in extent and depth, the channel through it being equally inconstant, and careful mariners had always taken soundings prior to crossing it (R. 20; RR. 16, 17, 44, 45, 98). This well-known fact, coupled with the warning to bidders (see p. 9, n. 5, *supra*), leaves no room for any contention that changes in the bar were unexpected, even had they been substantial.

(d) *Weather Conditions.* Article 9 of the contract (Appendix, pp. 22–23 *infra*) which requires the contractor to pay liquidated damages for each day of delay in completing the work, provides that such damages shall not be assessed for "unforeseeable" causes, including "unusually severe weather." A proviso to Article 9 states that

> the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts or delay shall be final and conclusive on the parties hereto (R. 8).

Petitioner had consistently sought extensions of time under Article 9 on the asserted ground that it had encountered unusually severe weather while

repairing the jetties. To determine the merit of this claim, the contracting officer tabulated, from reports submitted by Government officials in connection with previous repairs of the jetties, the number of days in each month on which work had been done in other years. Comparison of these figures with the days on which work could have been done in the years 1936 and 1937—the period during which petitioner was engaged in repairing the jetties—showed that weather and sea conditions for the two years combined had been slightly better than average, that for 1936 being above, and that for 1937 being slightly below average.

The court, in reviewing the findings of the contracting officer and the tables on which they were based, stated itself to be "satisfied that he acted correctly in denying plaintiff's request for extensions of time on account of unusually severe weather" (R. 37) and specifically found that the weather during the period of the performance of the contract was not unusually severe or more severe than reasonably might have been expected (R. 33).

There is no merit in petitioner's contention that the court denied it due process in "adopting" findings made by the contracting officer without a hearing or the right to cross-examination (Pet. 16). Nothing in the contract or in any rule of law requires that the contracting officer, before he makes findings of fact, must hold a hearing or afford the contractor a right of cross-examina-

tion; and the consistent practice under a provision such as Article 9, giving finality to the contracting officer's findings of fact, has been not to hold any hearing. Cf. *Kihlberg* v. *United States,* 97 U. S. 398; *United States* v. *Callahan Walker Constr. Co.,* 317 U. S. 56, 59.

Moreover, the findings below show that the court did not "adopt" the contracting officer's findings but rather independently determined that the weather during the period of performance had not been unusually severe (R. 33, 37). Petitioner cannot complain that in making such determination the court relied in part on statements in documents introduced by petitioner itself into the record (PR. 83). *Chicago & E. I. R. Co.* v. *Collins Prod. Co.,* 249 U. S. 186; *McGillin* v. *Bennett,* 132 U. S. 445; *Avendano* v. *Gay,* 8 Wall. 376. And apart from the findings of the contracting officer, there is ample evidence in the record that the delays were not due to the weather.[7]

[7] The record shows that had work been performed at an average rate on all the days on which weather and sea conditions permitted, the contract would have been completed well within the time originally fixed (RR. 146, 151–156, 160). Petitioner resumed work under the contract on April 18, 1936, but no work was done in May because the tow-boat first employed was found unsuitable for work around the jetties (RR. 59, 93, 133–136; PR. 70, 74), and another boat did not arrive until June 1, 1936 (RR. 137). In the course of the succeeding months (June, July, August, and September) more than half the total tonnage placed under the contract was disposed (RR. 145), but on the last day of September the equipment used in the work was withdrawn for repairs (RR. 141; PR. 88) and no work was done be-

Furthermore, proof that the weather was severe does not alone justify petitioner's dilatory performance, for the contingencies enumerated in Article 9 as releasing contractor from liability from liquidated damages must be unforeseeable. *United States* v. *Brooks-Callaway Co.*, 318 U. S. 120. The specifications call petitioner's attention to the fact that "the work is exposed to *severe easterly storms*" [Italics added] and it was required in bidding on the job to take into account the uncertainty of the weather (R. 37). The severity of the weather not being unforeseeable, the court properly held that petitioner could not claim an extension of time on that account.

2. THE CHANGE ORDER DID NOT ANNUL THE LIQUIDATED DAMAGE PROVISION OF THE CONTRACT

Article 3 of the contract (Appendix, pp. 21–22, *infra*) provides that if the Government orders any changes in the specifications which affect the amount due under the contract or the time required for its performance, an equitable adjust-

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tween September 30, 1936, and late in March 1937. An extension to March 1, 1937, to "obtain additional equipment" was asked and granted (R. 26; PR. 122 (Ex. 53); RR. 174 (Ex. 52)), but not until the latter part of March 1937 was work resumed, although weather conditions would have permitted work during the intervening months (RR. 92, 152–155, 192–205 (Ex. N)). A breakdown of equipment prevented work during several days in July (RR. 153). On August 13, the contracting officer complained of the unsatisfactory progress, pointing out that during 1937 only 2,000 tons a month were being laid as against an average of 5,000 tons per month during 1936.

ment shall be made, but claim therefor must be asserted within ten days from the date the change is ordered. Pursuant to this provision, a change order was issued by the Government and accepted by petitioner on September 22, 1937, altering the specifications in respect to the shape of the mounds at the ends of the jetties. The order stated that since the change would not increase the difficulty of placing the stone, no additional time would be allowed nor would the unit price be changed. The order was accepted by petitioner's president (R. 16–18).

Petitioner now contends that the delay for which liquidated damages were charged, was due to this change order, and hence should be remitted (Pet. 19–21). The facts refute this contention.

At the time the change order was issued, approximately 10 percent of the total tonnage placed had still to be laid (RR. 68, 92), and of this tonnage less than half was thereafter placed on the jetty mounds, the remainder being used along the jetties (PR. 158 (Ex. 85)). No claim for additional time or compensation on this account was made until almost a year later, when on September 21, 1938, petitioner complained that the change in specifications had caused delay in completing the repairs (PR. 135, Ex. 75). The commissioner of the Court of Claims who took the evidence and heard the witnesses found that the change

order did not hinder or delay petitioner in the completion of the contract, except in so far as the latter may have withheld at its own election the placing of stone on the mounds (C. Cls. Rec. 42). And while the court below made no finding as to the effect of the change order, its decision implicitly rejects petitioner's contention that the order annulled its obligation to pay liquidated damages for delay.[8]

Petitioner complains of the absence of any finding on this point below (Pet. 19–21). But since nothing in the facts surrounding the issuance of the change order would have affected its plain terms, petitioner was not prejudiced by the omission of any reference thereto in the findings of fact. *Sun Co.* v. *Vinton Petroleum Co.*, 248 Fed. 623, 626 (C. C. A. 5), certiorari denied 247 U. S. 514; *Kustoff* v. *Chaplin*, 120 F. (2d) 551, 559 (C. C. A. 9). In reaching its conclusion that liquidated damages had correctly been assessed, the court was under no obligation to explore every factual issue raised by petitioner, however insubstantial. Cf. *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370 (C. C. A. 6). Certainly, there is no

[8] The argument that the acceptance of the modification was without consideration is completely without merit. The change made was authorized by Article 3 of the contract, and the contract price related as much to the privilege of making it as to any other provision in the contract. *Griffiths* v. *United States*, 74 C. Cls. 245, 255; *Harrison* v. *City of Tampa*, 247 Fed. 569 (S. D. Fla.). Moreover, the promise to pay the agreed unit price per ton for the additional stone called for by the change in the specifications was sufficient consideration for its acceptance by petitioner.

reason to remand a case when the findings sought would not avail the party seeking them. *Sanford & Brooks Co.* v. *United States,* 267 U. S. 455.

3. PETITIONER IS NOT ENTITLED TO RESCIND THE CONTRACT AND RECOVER IN QUANTUM MERUIT

Article 9 of the contract, which imposes liquidated damages on account of delay in completing the work except where that is due to unforeseen causes, empowers the contracting officer to "ascertain the facts and the extent of the delay." Article 15 of the contract empowers the contracting officer to decide "all disputes concerning questions of fact arising" under the contract. Both articles provide that the findings or decision of the contracting officer as to questions of fact shall be "final and conclusive," subject to appeal to the head of the department, whose decision on such questions shall be final and conclusive (Appendix, pp. 22–24 *infra*).

Petitioner presented to the contracting officer its claims for remission of liquidated damages on account of allegedly unforeseen causes, and for additional compensation on account of allegedly unknown conditions at the site. The contracting officer made findings of fact and rejected both claims. Petitioner appealed to the Secretary of War, but the latter refused to act on the appeal on the ground that the matter was solely for the General Accounting Office. The court below styled this a "breach of contract," but held that on

the merits petitioner's claims were unfounded (R. 37). Because of the failure of the Secretary of War to review the findings of the contracting officer, petitioner now contends that it was entitled to rescind the contract and to recover for the work done in *quantum meruit* (Pet. 10, 13–15). This is entirely without merit.

It is doubtful whether the Secretary's refusal to review the findings of his subordinate was a "breach of contract," for the stipulation concerning review is not stated in the form of a promise, but rather as a qualification upon the finality of the contracting officer's findings (see Appendix, pp. 23–24 *infra*). Refusal to review would at most deprive such findings of their finality; it would hardly constitute a breach of any duty to petitioner. Cf. Williston & Thompson, *Contracts*, Rev. Ed., § 677.

Even if it was a breach of contract, rescission does not automatically follow. A breach justifying rescission must go to the root of the contract and must be so substantial and fundamental as to defeat the object of the contracting parties. *Loudon* v. *Taxing District*, 104 U. S. 771; *Kaufmann* v. *Raeder*, 108 Fed. 171, 179 (C. C. A. 8). If the breach, as here, is of an incidental and subordinate part of the contract, rescission is not warranted. *In re Waterson, Berlin and Snyder Co.*, 48 F. (2d) 704 (C. C. A. 2); *Callanan* v. *Keeseville, etc. R. Co.*, 199 N. Y. 268. And it is

settled that where the breach consists of a failure to pay money due for completed performance, the party who has fully performed is not entitled to rescind the contract and recover for work done on a *quantum meruit* basis. *Restatement, Contracts,* § 350; Williston & Thompson, *Contracts,* Rev. Ed., § 1459; see *Dermott* v. *Jones,* 2 Wall. 1, 9. Here, petitioner's complaint lies in the Government's refusal to pay him a liquidated sum alleged to be due under the contract; the refusal of the Secretary to review the contracting officer's findings was merely denial of a procedural step which might lead to the administrative award of that sum. Petitioner plainly had no interest in the review as such.[9]

CONCLUSION

The case presents no questions requiring review by this Court. The only substantial question is whether the facts entitle petitioner to additional compensation and to remission of liquidated damages, and as to this issue the record amply supports the judgment below.

[9] Petitioner's intimation (Pet. 13) that the contracting officer's failure to investigate subsurface and weather conditions promptly after complaint also constituted a breach of contract, adds no weight to his alleged right to rescind. For even if the delay had that effect, rescission should have taken place reasonably soon after the "prompt" investigation was not forthcoming. Certainly, petitioner cannot complete the work and then seek to rely upon a fact by which he was uninjured, in order to obtain a more favorable measure of payment than the agreed contract price.

We respectfully submit that the petition for writ of certiorari should be denied.

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Attorneys.

MARCH 1944.

APPENDIX

The pertinent provisions of the contract between petitioner and the United States government are as follows:

> ARTICLE 1. *Statement of work.*—The contractor shall furnish all labor and materials, and perform all work required for repairs to the north and south jetties at the entrance to Newburyport Harbor, Massachusetts, as described in paragraph 2 of the specifications hereto attached, for the consideration of Two Dollars and Eighty-Eight Cents ($2.88) per ton of 2,000 pounds for rubblestone furnished and placed in the jetties, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof * * *
>
> * * * * *
>
> The work shall be commenced within twenty (20) calendar days after the date of receipt by the contractor of notice to proceed, and shall be completed within three hundred and sixty-five (365) calendar days after the date of receipt of said notice to proceed, exclusive of the period between January 1 and February 29, inclusive.
>
> * * * * *
>
> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjust-

ment shall be made and the contract shall be modified in writing accordingly. * * * Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

* * * * *

ART. 9. *Delays—Damages.*— * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which

event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts or delay shall be final and conclusive on the parties hereto.

* * * * *

ART. 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by

the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

SPECIFICATIONS

* * * * *

3. COMMENCEMENT, PROSECUTION, AND COMPLETION: * * *

In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion plus any extensions of time duly granted under Articles 3, 4, 5 and 9 of the contract, the contractor shall pay the Government as liquidated damages the sum of $25.00 for each calendar day of delay until the work is completed or accepted.

No allowance will be made for failure of a bidder correctly to estimate the difficulties attending the execution of the work.

* * * * *

7. PHYSICAL DATA: The mean range of tide is 7.9 feet. The work is exposed to severe easterly storms. There are no bridges or other obstructions between the proposed work and the sea. The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations.

Standard government instructions to bidders to which the invitation for bids specifically referred contains the following paragraph:

Standard Government Instructions to Bidders

(Construction and Supplies)

1. *Preparation of bids.*—Unless otherwise directed in the invitation, bids shall be submitted in triplicate. Forms furnished, or copies thereof, shall be used, and strict compliance is necessary with the requirements of the invitation, these instructions, and the instructions printed on the forms. Special care should be exercised in the preparation of bids. Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies. All designations and prices shall be fully and clearly set forth. Copies of the bids shall be identical. The proper blank spaces in the bid and guaranty forms shall be suitably filled in.

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IN THE

Supreme Court of the United States

October Term, 1943

CAPE ANN GRANITE COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

HORACE M. GRAY,
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CORPORATE PRESS, INC., NEW YORK CITY

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PETITIONER'S REPLY BRIEF

A number of inaccuracies appearing in the brief filed in opposition by the United States and other features therein require attention. These will be referred to page by page as the most convenient method.

Page 2. The Change Order did not "stipulate that it in no way affected the completion date originally fixed". The Change Order merely pointed out that the new work on the mounds did not exceed the amount of work called for in the original contract (R. 17). The language used is:

> "The change in the size and form of the mounds will not increase the difficulty of placing the stone, *hence* it is understood and agreed

> that on account of the foregoing modification of said contract no additional time will be allowed [additional to what?] nor any change made in the unit price as stated in the contract." (Italics supplied.)

The Government seems to take the arbitrary stand that work should have been completed before March 5, 1937, that was not even specified until September 22, 1937, more than six months later.

Under "Question 3," the payment made by the Government in January, 1938, after the completion of the work on December 22, 1937, was *not* final payment by the Government, since a later payment was made by the General Accounting Office in August, 1939, *after* the Secretary of War had refused to consider the appeal as the contract required (*cf.* Government brief, page 5).

Page 7. The statement at the bottom of this page and at the top of the next page:

> "The Government had made a scientific study of current velocity under various tidal conditions and over the full tidal cycle and the average stated in the specifications was the result of that study."

is quite incorrect.

The finding of 2.08 miles per hour was made in November, 1937 (PR. 163).* But the Specifications were drawn in the Summer of 1935 *before* bids were invited. Therefore, the average stated in the Specifications *could not* have been "the result of that study". The petitioner has pointed out (Pet. 24) that the study did *not* include *the full tidal cycle* but only a period of but 3.75 hours out of 7.5 hours of three *ebb* tides only,

* PR. refers to the unprinted record designated by the petitioner.

and that the "study" was made to ascertain current *direction* only. A scientific study of *velocity* would have required many more observations with different equipment.

Page 9. The flood of March, 1936,—before work commenced, in April—so changed subsurface and latent conditions that the Government itself withdrew the soundings on Charts Nos. 331 and 1206 (Pet. 18).

The purported quotation from Article 4 of the Contract omits and substitutes arterisks for the phrase particularly pertinent to this case, viz.: *"or the Government discover"*. The petitioner contends that the Government first discovered changes in subsurface and latent conditions and published official notices thereof (Pet. 17-18). Under the contract no duty devolved upon the Contractor to refer the Government to its own discovery made by the office of the contracting officer.

Page 10. The statement in the Government's brief that:

> "* * * and not until a year and a half later were such changes cited by petitioner as justifying the delays in the completion of the contract."

is misleading because it appears by the uncontradicted statement in Exhibit 64 (PR. 123) that oral notifications thereof had been given "from time to time" to the Contracting Officer on prior occasions.

The note at the bottom of page 10 in which the statement is made:

> "* * * but the shallowest depth of the channel through the bar had merely changed from 10 feet prior to the flood to 9.5 feet",

is based solely upon the very findings of the Contracting Officer (PR. 157) which are challenged in this petition and which are not supported in the Record by any other evidence. The Government produced no chart or record to contradict the soundings shown on revised Chart No. 331 (Exhibit 90, PR. 160) which directly contradict the quoted statement.

Page 11. The statement at the top of this page that:

> "* * * the evidence shows that the sand bar was constantly shifting in extent and depth, the channel through it being equally inconstant, and careful mariners had already taken soundings prior to crossing it."

is correct, but this knowledge *was not brought home,* directly or inferentially, to the president of the petitioner who prepared the bid. These facts are contrary to the representation in Par. 7 of the Specifications.

Page 12. The tabulation of prior weather reports relied upon by the Government is part of the basis for the petitioner's complaint. These tabulations were made without any opportunity to petitioner to attack their accuracy or materiality before the Contracting Officer or to cross-examine any witnesses.

Page 13. The *Kihlberg* and *Callahan* cases are not in point for the reason, among others, that the Quartermaster and the Contracting Officer, respectively, had no personal short-coming to cover up as Col. Lyman had here.

The lower Court had no evidentiary basis upon which to determine "independently" relative weather conditions other than the findings of the Contracting Officer under attack.

Page 14. The Government fails to appreciate that the condition of the weather alone was not the exclusive cause for delay, but rather the weather *combined* with the excessive current. The combination of even *normally* severe weather and the excessive and *unforeseeable* current produced an unforeseeable result that required adjustment under the contract.

Page 15. The statement in the Government's brief:

> "The commissioner of the Court of Claims who took the evidence *and heard the witnesses* found that the Change Order did not hinder or delay petitioner in the completion of the contract, except insofar as the latter may have withheld at its own election the placing of stone on the mounds (C. Cls. Rec. 42)." (Italics supplied.)

is contrary to the record since *all* the testimony was taken by Commissioners Church and Gordon, but the Report of Commissioner was made by Commissioner *Evans* (Pet. 8) who heard none of the witnesses.

Page 16. (Note 8) The Government overlooks the fact that the lower Court has held that the Government breached the contract. Therefore, no part of the breached contract can be available to the Government as a consideration for the Change Order.

Page 18. The breach by the Government was not "of an incidental and subordinate part of the contract," since it went to the root of Articles 4, 9 and 15 of the contract which provided the protection afforded the Contractor against requirements of performance beyond the boundaries of its bid.

Page 19. (Note) The rescission of the contract was made promptly after the breach of the contract by the Secretary of War who, up to that time, had it within his power to rectify the prior breaches of contract by the Contracting Officer.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

HORACE M. GRAY,
Attorney for Petitioner.

March 22, 1944.